In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA, PETITIONER

v.

THE CHEROKEE NATION, THE CHOCTAW NATION, AND THE CHICKASAW NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General, on behalf of the United States, submits this memorandum *amicus curiae* in opposition to the petition for a writ of certiorari.

QUESTION PRESENTED

Whether the court of appeals erred in confirming title to certain portions of the bed of the Arkansas River in the Cherokee, Choctaw and Chickasaw Indian Tribes.

INTEREST OF THE UNITED STATES

As the grantor to the respondents of title to the lands in question the United States is interested in

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assuring that the grant is interpreted in accordance with the intent of the treaties by which the grant was made as established by this Court in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620.

STATEMENT

1. The Cherokee Nation, an Indian Tribe, initiated this action in December 1966, demanding an accounting of the proceeds from mineral leases issued by the State of Oklahoma on lands in the bed of the Arkansas River in Oklahoma below the Grand River. The Cherokees claimed title to the entire bed of the Arkansas River where it flows through the interior of Cherokee lands (from the confluence of the Grand River to the confluence of the Canadian River) and to half of the bed of the river where the Cherokee Tribe owns the north bank. The Choctaw Nation, joined by the Chickasaws who have an undivided one-fourth interest in this portion of Choctaw lands, intervened and claimed the entire bed of the river in the area where it is the common boundary between the two Tribes' lands (from the Canadian River to the Oklahoma-Arkansas state line at Fort Smith). The district court rejected the claims of the three Indian Tribes, and the court of appeals affirmed. 402 F. 2d 739 (C.A. 10). This Court, on writ of certiorari, reversed and remanded, holding that, under the applicable treaties, the United States had conveyed title to the bed of the Arkansas River to the Tribes and that the State of Oklahoma did not own and could

not lawfully lease the river bed. *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620. On remand, the district court, in accordance with this Court's ruling, decreed among other things that the disputed portion of the river bed is owned by the three Tribes and further determined which portion belongs to each Tribe.

The State of Oklahoma appealed the portion of the decision affirming Indian ownership of the riverbed. The court of appeals affirmed that portion of the district court's decision, and reversed the portion of the decision partitioning ownership between the Tribes. Petitioner now seeks review in this Court of that portion of the court of appeals' decision holding that ownership of the riverbed is in the Indian Tribes.

ARGUMENT

The question presented in the present petition is the same issue decided adversely to petitioner when this case was last before this Court—whether the State of Oklahoma or the respondent Indian Tribes own certain portions of the bed of the Arkansas River and consequently the mineral production from those lands. *Choctaw Nation* v. *Oklahoma, supra.* The thrust of petitioner's argument is that in some way this Court in *Choctaw Nation* spoke only historically and did not decide that the respondent Tribes rather than petitioner now own the bed of the river, and its mineral production. However, both the Court's opinion and the dissent in *Choctaw* state clearly that what was there at stake was present ownership of

the riverbed. Mr. Justice Marshall, writing for the Court, stated (397 U.S. at 621):

> These cases involve a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

And Mr. Justice White, dissenting, stated (*id.* at 643):

> At issue in these cases is the ownership of the lands underlying the Arkansas River from its confluence with the Grand River in Oklahoma downstream to the western border of Arkansas.

In resolution of these issues the Court reversed the judgment of the court of appeals that title was in the State of Oklahoma, and held that the Tribes own the riverbed in question. *Id.* at 635–636. To read the *Choctaw* opinion as deciding less than this ignores the reversal of the court of appeals' previous judgment and is tantamount to saying that this Court engaged in a meaningless exercise, since resolution of the historical question alone would have had no practical application in concluding the controversy before the Court.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 19[illegible]